DEC 23 2002

No. 02-621

In the Supreme Court of the United States

THOMAS M. BIDEGARY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for willfully preparing and filing false tax returns, petitioner was entitled to a separate good faith instruction, where the district court correctly instructed the jury on the element of willfulness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. Exh. 1) is not published in the *Federal Reporter*, but is reprinted at 39 Fed. Appx. 506.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2002. A petition for rehearing was denied on July 17, 2002 (Pet. App. Exh. 4).[1] The petition for a

[1] Petitioner filed a motion for extension of time to file a petition for rehearing and rehearing en banc. The motion was denied as to the petition for panel rehearing but granted as to the petition for rehearing en banc. Pet. App. Exh. 2. Despite the extension, petitioner filed the petition for rehearing en banc one day late. Petitioner was granted leave to file the tardy petition for rehearing en banc. Pet. App. Exh. 3. The July 17 order stated that

writ of certiorari was not filed until October 16, 2002, and is out of time under Rule 13 of the Rules of this Court.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial, petitioner was found guilty on 18 counts of aiding and assisting in the filing of false tax returns, in violation of 26 U.S.C. 7206(2), one count of making and subscribing a false tax return, in violation of 26 U.S.C. 7206(1), and one count of theft and conversion of government funds, in violation of 18 U.S.C. 641. Petitioner was sentenced to 33 months of imprisonment on each count, to run concurrently. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. Exh. 1.

1. a. Petitioner was employed by the Internal Revenue Service as a Revenue Agent and audited tax returns for almost five years, between 1973 and 1978. From 1980 to 1986, petitioner was involved in the solicitation of prospective investors to participate in limited partnerships with respect to various real estate holdings and developments commenced by petitioner. In 1988, in a prosecution by the State of California, petitioner was convicted on two counts of selling securities without a permit and one count of grand theft; in a second prosecution in 1989, he was convicted on one count of selling securities without a permit and em-

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both "[t]he petition for rehearing and the petition for rehearing en banc are denied." Pet. App. Exh. 4. Because petitioner did not file a "timely" petition for rehearing, Sup. Ct. R. 13.3, it is not clear that the time for filing a petition for certiorari runs from the July 17 order as opposed to the April 5 entry of judgment.

[2] Petitioner erroneously states (Pet. 8) that the "Petition has been filed within 90 days of the Final Order Denying Rehearing."

bezzlement. In August 1991, petitioner was released from incarceration, and until August 1993, he was on parole. Gov't C.A. Br. 3-4.

After his release from prison in August 1991, petitioner moved to Winnemuca, Nevada. From 1992 to January 1999, petitioner prepared tax returns at Winnemucca Tax and Bookkeeping Service (WTBS), a tax preparation business owned by his mother, Mary Shannon. During that time, petitioner and his wife operated a general store. Juanita Kennedy, who lived with petitioner and his wife for 13 years and helped to raise their children, worked at the store seven days a week but was not paid a salary. In addition to preparing returns for clients of WTBS, petitioner also prepared returns for himself, his mother, and Juanita Kennedy. Gov't C.A. Br. 4.

b. While still on parole for the earlier convictions, petitioner began preparing false returns for the clients of WTBS. Petitioner would, among other things, (a) falsely deduct the cost of commuting to work as a vehicle expense, (b) falsely deduct the cost of tools, (c) falsely claim deductions for charitable contributions, (d) falsely claim entitlement to the tax-favored "head of household" filing status, and (e) falsely claim entitlement to the earned income credit. Gov't C.A. Br. 4.

With respect to vehicle expenses, petitioner deducted the cost of commuting, which is a nondeductible personal expense, and claimed vehicle expenses for taxpayers who rode to work in a van supplied by the taxpayers' employers at no cost. Petitioner also deducted the cost of tools that taxpayers used at work only occasionally and at their own convenience, which is a nondeductible personal expense, and claimed deductions for tools that taxpayers did not even use at work. Petitioner claimed the "head of household" filing status

for married taxpayers (including on returns for himself and his wife), even though that status is limited to unmarried (or, under some circumstances, separated) taxpayers who have a dependent living with them. He also prepared a "head of household" return for Juanita Kennedy that falsely listed his cousin's son as her stepson. In addition, petitioner falsely listed his own son and his cousin's son as dependents of Ms. Kennedy for purposes of the earned income credit, and he deposited the resulting refund check into an account that he controlled. Gov't C.A. Br. 4-5.

Among other returns defendant prepared was the 1995 return of Carlos R. Esparza, which indicated that Esparza's son lived with him for the entire 12 months in 1995, and which claimed an earned income credit of $2094. The United States Treasury issued a refund check in the amount of $2155, an amount that included the claimed earned income credit. After Esparza advised petitioner that his son lived with him for only two or three months in 1995, petitioner took possession of the check, telling Esparaza that they should wait six months to see if there was an audit. When Esparza later inquired about the check, petitioner falsely claimed that he had given the check to someone with a letter from the IRS seeking the return of the check. Petitioner, in fact, had deposited the check and expended the funds. Gov't C.A. Br. 5.

2. a. On January 20, 1999, a federal grand jury in the District of Nevada indicted petitioner and Shannon (petitioner's mother). They were charged with preparing false income tax returns by, *inter alia*, claiming false deductions, falsely claiming entitlement to the tax-favored "head of household" filing status, and falsely claiming entitlement to the earned income credit. On January 26, 2000, a superseding indictment was filed

that contained 26 counts against petitioner and four counts against Shannon. Gov't C.A. Br. 2.

Counts 1-21 and 23-25 charged petitioner with willfully aiding and assisting in the filing of false tax returns, in violation of 26 U.S.C. 7206(2). Counts 22 and 26-29 charged petitioner with making and subscribing a false tax return, in violation of 26 U.S.C. 7206(1). Count 30 charged petitioner with theft and conversion of government funds, in violation of 18 U.S.C. 641, and was based on petitioner's conversion of a refund check issued by the United States Treasury Department. Gov't C.A. Br. 3.[3]

b. At trial, petitioner proffered a five-paragraph instruction defining the element of "willfulness" under the federal criminal tax laws. Pet. App. Exh. 5. The last paragraph stated that the "defendant's conduct is not willful if he acted through negligence[,] gross inadvertence[,] careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law." *Id.* at 3.[4] The government objected to petitioner's proffered instruction on the ground that it was contradictory and confusing. Pet. App. Exh. 6. The district court, observing that "[t]here comes a moment in time where you stop telling the jury what the English language means and just use English," declined to give the five paragraph definition of willfulness proffered by petitioner. Pet. App. Exh. 8, at 13.

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[3] Counts 18-20 were later dismissed on the government's motion. Gov't C.A. Br. 3.

[4] The pages of petitioner's appendix are not numbered. The indicated page numbers are to the specific page within the referenced exhibit.

With respect to the Section 7206(1) counts, the jury was instructed (Instruction 28) that "[a] person acts 'willfully' by voluntarily and intentionally assisting or advising another to do something that the person knows disobeys or disregards the law." Pet. App. Exh. 7, at 11. With respect to the Section 7206(2) counts, the jury was instructed (Instruction 33) that "[a]n act is done willfully if done voluntarily and intentionally with the purpose of violat[ing a] known legal duty." *Id.* at 13. The jury was also instructed (Instruction 3) that petitioner contended "that he is not guilty of the crimes charged because he prepared all tax returns in good faith and based upon the information provided by the taxpayers." *Id.* at 2.

c. The jury found petitioner guilty on 18 counts of willfully aiding and assisting in the filing of false tax returns, in violation of 26 U.S.C. 7206(2), one count of willfully making and subscribing a false tax return, in violation of 26 U.S.C. 7206(1), and one count of theft and conversion of government funds, in violation of 18 U.S.C. 641. Gov't C.A. Br. 3.

3. On appeal, petitioner contended, *inter alia*, that the district court erred in declining to give the jury a separate instruction that a good-faith mistake of law constituted a defense to the charged tax offenses. Petitioner argued that he was entitled to the charge contained in the fifth paragraph of his proposed instruction, which stated that the "defendant['s] conduct is not willful if he acted through negligence[,] gross inadvertence[,] careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law." Pet. App. Exh. 5, at 3. Petitioner also argued that the instructions stating a person acts "willfully" when he acts intentionally with the purpose of violating a known legal duty failed to

describe with sufficient specificity the duty he violated. According to petitioner, the jury, instead of finding that he violated a known legal duty not to prepare and file false tax returns, could have found him guilty on the basis that the "known legal duty" petitioner violated was a "duty to stay current with the tax law." Pet. App. Exh. 1, at 3.

The court of appeals affirmed. Pet. App. Exh. 1. The court held that a "separate instruction on good faith is unnecessary where the trial court has adequately instructed the jury on specific intent." *Id.* at 2. The court determined that the "instructions given here adequately advised the jury of the specific intent required under sections 7206(1) and 7206(2)," and that those instructions "preclude a finding of willfulness if [petitioner] acted through negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or a good faith misunderstanding of the requirements of the law." *Ibid.*

The court also rejected petitioner's contention that the instructions did not describe the duty he violated with sufficient specificity. Pet. App. Exh. 1, at 3. The court held that the legal duty relevant to Section 7206(1)—the duty not to file a return that is incorrect as to a material matter—was correctly charged in Instructions 30 and 31. *Ibid.* The court likewise held that the legal duty relevant to Section 7206(2)—the duty not to assist in the filing of fraudulent or false returns—was correctly charged in Instructions 27, 28, and 29. *Ibid.* The court thus concluded that the jury was "properly instructed as to the elements of the offenses, and there was no ambiguity as to what duties [petitioner] was charged with violating." *Ibid.*

ARGUMENT

Petitioner renews his claim (Pet. 9-23) that a defendant charged with willfully violating the federal criminal tax laws is entitled to a separate instruction on good faith misunderstanding of the law. That claim lacks merit and does not warrant further review.[5]

1. In *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam), the Court made clear that, in the context of criminal tax cases, "willfulness * * * simply means a voluntary, intentional violation of a known legal duty." See also *Cheek* v. *United States*, 498 U.S. 192, 201 (1991); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). Here, the jury was properly instructed that, in order to find that petitioner acted willfully, it was required to find that petitioner voluntarily and intentionally violated a known legal duty not to prepare or file materially false or fraudulent tax returns. Pet. App. Exh. 7, at 11, 13. Accordingly, the instructions adequately conveyed to the jury the definition of willfulness and the proof required to establish that element.

Petitioner argues (Pet. 12, 22) that, even if the jury was correctly charged on the element of willfulness, he nonetheless was entitled to a separate instruction that his conduct was not willful if he acted under a good faith misunderstanding of the requirements of the law. That is incorrect.

As this Court explained in *Pomponio*, because "[t]he trial judge * * * adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary." 429 U.S. at 13. The requirement that the jury find that petitioner intentionally acted in violation of a known legal duty necessarily precluded a

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[5] In addition, the petition was filed out of time.

finding of willfulness if petitioner acted based on a good-faith misunderstanding of the law. That is because "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Cheek*, 498 U.S. at 202. A good-faith instruction thus would constitute no more than a restatement of the proposition that willfulness is not established if the knowledge required by the willfulness instruction were not proved. Because the good-faith defense was covered by the willfulness instruction given by the district court, a separate instruction on good faith was not necessary. *Pomponio*, 429 U.S. at 13; *Cheek*, 498 U.S. at 201.

Moreover, the jury here not only was adequately instructed on willfulness, but also was expressly charged that it was petitioner's contention "that he is not guilty of the crimes charged because he prepared all tax returns in good faith and based upon the information provided by the taxpayers." Pet. App. Exh. 7, at 2. The instructions, taken as a whole, adequately conveyed to the jury the essence of petitioner's good-faith defense.[6]

2. Neither *Mathews* v. *United States*, 485 U.S. 58 (1988), nor *United States* v. *Murdock*, 290 U.S. 389 (1933), on which petitioner relies (Pet. 9-11, 22),

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[6] Petitioner argues (Pet. 21) that, under the trial court's instructions on willfulness, he could have been convicted on the basis that he violated "the 'known legal duty' to stay current with the tax laws." Nothing in the instructions, however, suggested that the relevant legal duty was a duty to stay current with the tax laws. As the court of appeals correctly concluded (Pet. App. Exh. 1, at 3), the instructions sufficiently identified the legal duty relevant to each offense. The only duty that could be found under those instructions was the duty not to commit the conduct proscribed by the statutes under which petitioner was charged.

requires a separate instruction on good faith in the circumstances of this case. In *Mathews*, the Court held that, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. at 63. *Mathews*, however, involved the *affirmative defense* of entrapment, and it relied on other cases involving affirmative defenses, such as self-defense. See *id.* at 63-64 (discussing, *inter alia*, *Stevenson* v. *United States*, 162 U.S. 313 (1896)). This case does not involve an affirmative defense, because petitioner does not contend that "good faith" would entitle him to an acquittal even if the elements of the relevant offense had been established. Instead, the "good faith" charge sought by petitioner amounts to a restatement of the element of willfulness.

In *Murdock*, the defendant was prosecuted for willfully failing to supply information concerning deductions claimed in his tax returns. 290 U.S. at 391. At trial, the court rejected the following requested instruction: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful." *Id.* at 393. This Court held that Murdock was entitled to the requested charge. *Id.* at 396. Unlike in this case, however, the jury in *Murdock* was not properly instructed on the element of willfulness. In fact, the trial court gave instructions that effectively took from the jury "the question of absence of evil motive." *Ibid.* This Court concluded that the requested instruction "was apt for the purpose" of submitting the question of willfulness to the jury. *Ibid.* Thus, *Murdock* does not stand for the proposition that a good-faith instruction

must be given where the jury has been properly instructed on willfulness. Indeed, in *Pomponio*, the Court cited *Murdock* when defining the element of willfulness, and subsequently held that no "additional instruction on good faith" is necessary when the jury is "adequately instructed * * * on willfulness." 429 U.S. at 12-13.

3. Petitioner seeks review on the basis (Pet. 9) that the courts of appeals disagree on whether a defendant is entitled to a separate instruction on good faith even if the jury is properly instructed on the element of willfulness. While there is a minor disagreement among the circuits, this Court has repeatedly declined review on the question, and it should do so here as well.

A clear majority of the courts of appeals has held, in accordance with *Pomponio* and *Cheek*, that it is not reversible error for a district court to refuse to give a separate instruction on good faith if the other instructions adequately convey the requisite *mens rea* to establish willfulness. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990);[7] *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998);[8] *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert.

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[7] See also *United States* v. *McGill*, 953 F.2d 10, 12-13 (1st Cir. 1992); *United States* v. *Coast of Maine Lobster Co.*, 557 F.2d 905, 909 (1st Cir.), cert. denied, 434 U.S. 862 (1977).

[8] See also *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990).

denied, 514 U.S. 1084 (1995);[9] *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000);[10] *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

Moreover, the clear trend in the courts of appeals is away from requiring a separate instruction on good faith. The circuits that petitioner identifies as requiring a separate instruction on good faith have, with one exception, largely abandoned or modified previous decisions requiring such an instruction. See *Evangelista*, 122 F.3d at 118 (2d Cir.); *Storm*, 36 F.3d at 1294 (5th Cir.); *Sassak*, 881 F.2d at 280 (6th Cir.); *Ervasti*, 201 F.3d at 1041 (8th Cir.); *Walker*, 26 F.3d at 110 (11th Cir.).

Only the Tenth Circuit has articulated and not yet disavowed the position that it is reversible error not to give a separate good-faith instruction. See *United States* v. *Harting*, 879 F.2d 765 (10th Cir. 1989). The Tenth Circuit's decision in *Harting* is erroneous. That decision rests on the notion that failure to give a good-faith instruction conflicts with this Court's decision in *Mathews*. *Id.* at 770. As explained, however, *Mathews* applies only in situations involving an affirmative defense. The Tenth Circuit's decision in *Harting* also erred in concluding that *Pomponio* is ambiguous on the

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[9] See also *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990); *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986).

[10] See also *Willis* v. *United States*, 87 F.3d 1004, 1008 (8th Cir. 1996); *United States* v. *Sanders*, 834 F.2d 717, 719 (8th Cir. 1987).

need for a separate good-faith instruction. *Pomponio* unambiguously holds that, because "[t]he trial judge * * * adequately instructed the jury on willfulness[,] [a]n additional instruction on good faith was unnecessary." 429 U.S. at 13.

Although the Tenth Circuit's position is incorrect, review of the question is unwarranted in this case. The vast majority of the circuits hold that it is not reversible error to refuse to give a separate instruction on good faith if the other instructions, taken as a whole, adequately explain the government's burden of proving willfulness. And like the other circuits that once required a separate good-faith instruction, the Tenth Circuit may reconsider its position. Moreover, where, as here, the instructions correctly define the willfulness element, the absence of a separate instruction specifically stating that good faith negates willfulness should have no effect on the verdict.[11]

There is thus no need for this Court to resolve the difference in approach between the court of appeals in this case and the Tenth Circuit. This Court has repeatedly denied review in cases raising the same issue that is presented here. See, *e.g.*, *Lewis* v. *United States*, 534 U.S. 814 (2001) (No. 00-1605); *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518); *Gross* v. *United States*, 506 U.S. 965 (1992) (No. 92-205); *Green* v. *United States*, 474 U.S. 925 (1985) (No. 84-2032).

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[11] Therefore, even if the failure to give a separate instruction on good faith could be considered an error, any error would be harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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